

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

WRITTEN REBUTTAL STATEMENT OF GOOGLE LLC

Volume 1 of 4

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TAB A

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**INTRODUCTORY MEMORANDUM TO THE
WRITTEN REBUTTAL STATEMENT OF GOOGLE LLC**

I. INTRODUCTION

Willing buyers and willing sellers would never agree to Copyright Owners’ scattershot proposal in this proceeding. Copyright Owners provide no single instance where a buyer or seller has ever agreed to 20% Service Provider Revenue, 40% TCC, no allocation of revenue, minimums of \$0.0015 per play and \$1.50 per Subscriber, and no promotional discounts for the rights at issue in this proceeding. And that is for good reason. These combined changes would increase Google’s mechanical royalties far beyond what it currently pays and what it has ever agreed to pay in its negotiations with publishers. Google entered this proceeding prepared to accept the rates established in the still-pending *Phonorecords III* remand proceeding—provided there was no unexpected surprise or material shift. What Copyright Owners propose here, however, is astonishing, excessive, and without marketplace support.

The most suspect parts of Copyright Owners’ proposal are their unsupported revisions to the “Offering” and “Service Provider Revenue” definitions. While they claim their proposal

*Google Written Rebuttal Statement
Dkt. No. 21-CRB-0001-PR (2023-2027)*

“maintains” the current rate structure and terms,¹ that claim is specious. The revised definitions eliminate—without clear warning or record support—*any* allocation between Section 115 eligible and non-eligible content for mixed service offerings. This position is directly in conflict with Section 115 and the current regulations, both of which contemplate allocation. And, equally important, it is in conflict with hundreds of benchmark deals. The presence of allocation in the relevant free market benchmarks is not surprising. Allocation permits agreement to different terms for the different parts of a mixed service. Refusing to allocate is economically irrational.

Copyright Owners justify their unprecedented proposal by arguing that higher mechanical royalties are needed to ensure the continued viability of songwriting as a profession. There are, of course, different reasons why many songwriters today (such as the five handpicked by Copyright Owners to serve as advocate-witnesses) may struggle financially. Copyright Owners themselves describe the challenges: there has been an explosion in new music (*i.e.*, songwriters competing against 30 to 50 million tracks during *Phonorecords III* versus over 75 million tracks now), publishers reluctant to increase advances, songwriters’ lack of control over use of their works, personal distaste for higher-earning radio singles, and the emergence of purely financial entities driving up the costs of acquiring music catalog.²

In the end, the predicament of many songwriters stems from the reality that (1) they are not the “sellers” of their songs, (2) any remuneration they receive depends on their deals with the publishers who own or administer their songs, and (3) they are now competing in a world where the consumer largely decides what music the consumer will listen to and when, creating a bonanza for the most popular songs and hard times for the millions of songs that barely get

¹ COs’ Corrected WDS Intro. Mem. at 2.

² See COs’ Corrected WDS Intro. Mem. at 25-28, 32.

played. While the cherry-picked songwriters testifying in this proceeding describe the difficulties they have faced recently, their experience is not homogenous. Some have enjoyed considerable financial success, especially those who have monetized their song catalogs. Copyright Owners claim that songwriters as a group receive [REDACTED] of every dollar of streaming income.³ But that does not mean *all* songwriters receive shares of that magnitude from publishers, who often pay a disproportionate share of streaming income to a small number of top songwriters. For example, UMPG’s data show that in 2020, the songwriter at the 10th percentile received [REDACTED] on the dollar, while the songwriter at the 90th percentile received [REDACTED] on the dollar—and the median songwriter received just [REDACTED] on the dollar.⁴ Increasing mechanical royalties is thus not the way to help struggling songwriters since much of any increase may go to those who are not struggling and the publishers. And it goes without saying that increasing mechanical royalties will also not help songwriters if their songs are not being streamed by consumers.

Google agrees that “[c]ompulsory rates should not pick winners or put a thumb on the scale for one business model over another.”⁵ In a competitive market, there will always be winning and losing services, publishers, and songwriters. The compulsory rates should not favor certain participants, pick strategies as winners, or protect certain models from failure. Thankfully, instead of picking winners and losers, the task here is the far simpler one of determining the terms of a freely negotiated agreement between willing buyers and sellers. That can be answered empirically instead of normatively since Google has hundreds of licenses with

³ See COs’ Corrected WDS Intro. Mem. at 31; Kelly WDT ¶ 74; Beekman WDT ¶ 51; Yocum WDT ¶ 43.

⁴ See Google Reb. Ex. 11 (P4-UMPG00004582).

⁵ COs’ Corrected WDS Intro. Mem. at 21.

publishers for the very rights at issue in this proceeding. These remain the best evidence available and should be the basis for the rates and terms established in this proceeding.

II. RATES AND TERMS

A. Google’s Publisher License Agreements Are the Most Salient Benchmarks and Should be Used Instead of the Label Deals or the Synch Licenses.

Instead of cherry-picking favorable agreements, Google has provided **all** of its current publisher licenses. These are the best evidence of the willing buyer/seller outcome: a complete set of actual agreements involving the same sellers for the same rights under virtually the same circumstances as the compulsory license.⁶ Google’s rate proposal specifically highlights the Audio-Only Tracks and Static Image Art Tracks. The Judges have previously held that these categories are the most analogous because they do not include a video component.⁷

Copyright Owners’ only real objection to these license agreements is the alleged downward influence of the Digital Millennium Copyright Act’s (“**DMCA**”) “safe harbor” provision over the underlying license negotiations. But Copyright Owners provide no evidence that the DMCA’s “safe harbor” played any role in any negotiations. They point to no documents. They offer no testimony from any negotiator. The three witnesses who make this claim do so without any supporting evidence.⁸ And Ms. Higginson, who personally negotiated or supervised the negotiations of these agreements for Google, does not recall being present in any negotiations

⁶ See Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), Final Rule, Fed. Reg. Vol. 86, No. 205, 59585 (Oct. 27, 2021) (“Web V, 86 Fed. Reg.”); *Boyce v. Soundview Tech. Grp. Inc.*, 464 F.3d 376, 387 (2d Cir. 2006).

⁷ See Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phono III), Final Rule, Fed. Reg. Vol. 84, No. 24, 1941-42 (Feb. 5, 2019) (“Phonorecords III, 84 Fed. Reg.”) (in contrast to “YouTube agreements concerning embedded videos,” the “static-image YouTube rates are more analogous to the interactive market”).

⁸ See Cohan WDT ¶ 38, n.14; Brodsky WDT ¶ 87; Kokakis WDT ¶ 76, n.33.

where the DMCA “safe harbor” was raised and does not know of any instance where it influenced the rates and terms in the publisher agreements.⁹

Aside from having no evidentiary support, there is no reason the DMCA “safe harbor” would play a role. As Ms. Higginson explains, it is not viable for Google to build a music streaming service based on the DMCA “safe harbor” since its invocation would require Google to take down material every time a copyright owner claimed copyright infringement.¹⁰ Simply put, Google could not offer a comprehensive streaming service to consumers if music content is constantly being taken down. Google negotiated direct deals to secure the rights needed for viable music coverage on YouTube. Everyone understood this. As such, it is not surprising there are no documents or witnesses claiming the DMCA “safe harbor” played a role.

Google’s direct publisher agreements should be given precedence over both the record label interactive deals (“**Label Deals**”) and the audiovisual synch licenses (“**Synch Licenses**”) that Copyright Owners rely on instead. This is well-worn territory the Judges have previously tread. The Label Deals are not comparable benchmarks because they involve different rights (sound recording rights), a different market (with different cost and demand characteristics), and different licensors (with greater investments and oligopoly power).¹¹ The Synch Licenses are likewise not comparable. They involve different rights under very different market conditions.¹² Specifically, unlike the interactive streaming market where each record label’s catalog is a “must

⁹ Higginson WRT ¶ 22.

¹⁰ *Id.* ¶ 23; *see also* 17 U.S.C. § 512(c)(1)(C).

¹¹ *See Web II Determination*, 72 Fed. Reg. at 24098 (different rights and market); *SDARS II Determination*, 78 Fed. Reg. at 23058 (same); *Report of The Copyright Arbitration Royalty Panel*, Docket. No. 2009 (CARP DTRA 1 & 2), at 41 (February 20, 2002) (“different cost and demand characteristics”); *Web V Determination*, 86 Fed. Reg. at 59454-78 (oligopoly power); *Web IV Determination*, 81 Fed. Reg. at 26368-26369 (same); *Phonorecords III*, 84 Fed. Reg. at 1964 (same); *see generally* Leonard WRT ¶¶ 51-54.

¹² *See Phonorecords III*, 84 Fed. Reg. 1918, 1941 (“The lack of comparability remains because the synchronization market differs in important economic respects from the streaming market.”); *see generally* Leonard WRT ¶¶ 75-77.

have” compliment, in the synch market, one record label’s catalog is “a substitute good” in competition with other labels’ catalogs.¹³ The [REDACTED], and on-demand fitness services’ Synch Licenses that Dr. Eisenach relies on suffer from the same incomparability.¹⁴

B. Google’s Publisher License Agreements Do Not Support Copyright Owners’ Proposed Rates, Structure, Or Terms.

Copyright Owners propose the following complex formula for calculating a service’s Section 115 royalties:

- Step 1: Greater of 20% of Service Provider Revenue and 40% of TCC.
- Step 2: Subtract Performance Royalties.
- Step 3: Greatest of (i) Step 1 – Step 2, (ii) Per Play rate of \$0.0015, and (iii) Per Subscriber Minimum (“PSM”) rate of \$1.50 per subscriber.¹⁵

Copyright Owners further propose eliminating Promotional Offerings (including Family Plans, Student Plans, and Free Trial Offerings).¹⁶

This approach is wholly inconsistent with music publishers’ direct licenses with Google, which [REDACTED]¹⁷ Those benchmark agreements have never adopted the rates that Copyright Owners now propose. Nor have they eliminated the

[REDACTED]¹⁸

¹³ *Phonorecords III*, 84 Fed. Reg. at 1941.

¹⁴ *Id.* at 1941 & n.98 (microsynch licenses are not exempt).

¹⁵ COs’ Corrected WDS Proposed Rates & Terms at 6-9.

¹⁶ *Id.* at 27, Appendix B-3, 5, 11.

¹⁷ *Id.* at 2-4, 7-10.

¹⁸

[REDACTED] *See, e.g.*, COEX-7.24 at AMZN_Remand_0008662, 669-679; COEX-7.30 at PAN_PRIII_Remand_00018881-886; COEX-7.72 at SPOTRMND0000121, 162-164, 179, 184-188, 196, 205; COEX-7.22 at AMZN_Remand_0000162-163; COEX-7.23 at AMZN_Remand_0000239; COEX-7.73 at SPOTRMND0001230-231, 240-241; COEX-7.74 at SPOTRMND0006138, 149-152; COEX-7.75 at SPOTRMND0000017, 023-026, 040-042, 046-047, 052-054; COEX-7.52 at APL-PHONO4_00001532-537.

These agreements also do not support a per-play rate. None of Google’s direct U.S. publisher agreements contain per-play rates. Google has not—and would not—agree to per-play rates because, as Ms. Higginson explains, they are minimum payments that would have to be made irrespective of the revenue received from music streaming.¹⁹ And because per-play rates could result in excessive costs that may even outpace revenues, they could create conflicting incentives because streaming services in such situations would be incentivized to cap or discourage usage by paying subscribers to contain content costs.²⁰ That, in turn, would detract from the user experience and potentially result in a loss of subscribers.²¹

The Judges have found per-play rates to be inappropriate in this context. In *Phonorecords III*, the Judges accepted Google’s expert, Dr. Leonard’s economic analysis that a subscriber to an interactive streaming service will pay an up-front charge for unlimited access to the service’s entire catalog of music for each paid period.²² As the Judges noted, it would be inappropriate to implement a rate structure under which royalties increase with every play, given that there is no marginal cost for each such additional play.²³ The Judges’ rationale for rejecting a per-play rate structure applies equally in this proceeding as it did in *Phonorecords III*.

III. ALLOCATION

A. The Revisions to “Offering” and “Service Provider Revenue” Improperly Eliminate the Need to Allocate Between Eligible and Ineligible Activity.

Both the statute and the current regulations contemplate the need for allocation. Section 115 of the Copyright Act states that the purpose of this proceeding is to “determine reasonable

¹⁹ Higginson WRT ¶ 21.

²⁰ *Id.* ¶ 20.

²¹ *Id.*

²² *Phonorecords III*, 84 Fed. Reg. at 59472- 73.

²³ *Id.*

rates and terms of royalty payments *for the activities specified by this section.*”²⁴ Similarly, the extant regulations provide that mechanical royalties must only be paid on “a Service Provider’s *engagement in Licensed Activity.*”²⁵ These provisions establish a clear nexus requirement—Section 115 mechanical royalty rates must only be paid on revenues earned from activities covered by the Section 115 compulsory license.

Copyright Owners propose revised definitions for “Offering” and “Service Provider Revenue” that eliminate any need to distinguish between types of activities and their revenue:²⁶

Offering means a ~~Service Provider’s engagement in Licensed Activity covered by subparts C and D of this part. Paid Locker Service means a Locker Service for which the End User pays a fee to the~~ product or service offered by a Service Provider providing Licensed Activity. Each such product or service is a distinct Offering if it is: (a) marketed or sold at a different price or with different branding; (b) subject to different End User eligibility requirements; or (c) subject to different terms and conditions of use. Each Bundled Subscription Offering with distinct components is a distinct Offering.

Service Provider Revenue ~~shall~~ means all Revenue in connection with any Licensed Activity, including:

- (1) all Revenue in connection with a Subscriber’s access to an Offering, whether or not such access actually occurs, provided that:

The revised “Offering” definition is no longer limited to the engagement in Section 115-eligible activities but broadly refers to any product or service that provides such activities. This could require mechanical royalties to be paid on all YouTube revenues, not just those attributable to Section 115-eligible activity. The revised “Service Provider Revenue” definition is expanded to include any revenue for access to a product that includes Section 115-eligible activities, without

²⁴ 17 U.S.C. § 115(c)(1)(E) (emphasis added).

²⁵ 37 CFR § 385.2.

²⁶ COs’ Corrected WDS Proposed Rates & Terms, App’x B at B-5, B-9.

any regard to whether there is actual consumption of Section 115-eligible sound recordings embodying musical works.

Copyright Owners understate the obvious effect of their proposal. They claim that their proposed definitions merely “maintain[] the scope of Licensed Activity subject to the Proposed Rates” and add “clarity” to the current definitions.²⁷ But that is not true. Their proposal would dramatically expand the scope of activity and revenues subject to their proposed rates by incorporating revenues attributable to non-Section 115 eligible content.

B. Copyright Owners Provide No Evidentiary Support for These Revisions.

Because Copyright Owners act as if their revised definitions effectuate no change, they provide no evidentiary support or explicit argument for the revisions. In the absence of a showing, these revisions should be rejected. If they make no change, they should not be adopted.

The only semblance of support is Copyright Owners’ inchoate concern that “diversified” companies may somehow be diverting or deferring revenues to the detriment of Copyright Owners. Because music streaming drives “complementary revenue streams” in a broader “ecosystem,” they argue, the payable royalty pool should be expanded to capture all revenue associated with the streaming product, and rates should be increased to better reflect the value of music.²⁸ There is no showing, however, that this is actually happening. Concerns, fears, and theories are not equivalent to evidence, facts, and proof.

Causality between complementary parts of a product, service, or ecosystem cannot be assumed. As Dr. Leonard explains, one cannot assume that music causes complementary revenues; it is equally possible that the true facts show “reverse causality,” or the possibility that

²⁷ Eisenach WDT ¶¶ 167, 175.

²⁸ See COs’ Corrected WDS Intro. Mem. at 10. See also, e.g., Eisenach WDT ¶¶ 59-65; Watt WDT ¶¶ 70-77; Flynn WDT ¶¶ 54-62.

other Google products and services attract customers to its music streaming products.²⁹ Indeed, if Google was actually underpricing its subscription products to drive customers to complementary products and to increase complementary revenues, then one would expect to see YouTube Music Premium—Google’s subscription music offering—priced *below* Spotify’s (and the industry’s) \$9.99 standard price.³⁰ But that has not happened.³¹ As Ms. Higginson confirms, her focus is on making YouTube’s services profitable, and she never considers whether YouTube Music Premium and YouTube Premium maximize other aspects of Google’s business.³²

Even assuming record support for the Copyright Owners’ concerns, the fact remains that willing buyers and sellers have entered into license agreements and royalties based on principles of allocation notwithstanding such concerns—be it revenue deferral, revenue diversion, ecosystem effects, complementary revenues, information asymmetries, etc.

C. Allocation Is Supported By Google’s Direct Deals.

Each of Google’s license agreements with music publishers include provisions for allocation because the parties have agreed to different rates for the different categories of content Google makes available.³³ Both major and smaller publishers have willingly agreed to allocation.³⁴ Thus, there are hundreds of agreements that support allocation and reject Copyright Owners’ revised definitions.

None of Copyright Owners’ “benchmarks” refute this evidence of allocation. [REDACTED]

[REDACTED]

²⁹ See generally Leonard WRT ¶¶ 82-84.

³⁰ *Id.* ¶ 85.

³¹ *Id.*

³² Higginson WRT ¶ 24.

³³ Higginson WDT ¶¶ 33-37.

³⁴ *Id.*

[REDACTED]³⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] And the remaining “benchmarks” were

negotiated for primarily pure-play music services prior to the addition of significant non-music content to their offerings (*e.g.*, podcasts). Those agreements are therefore not relevant market evidence rejecting allocation between Section 115-eligible and non-eligible content.

D. Failure to Allocate Revenue Is Economically Irrational.

From a theoretical perspective, the demand for interactive music streaming services—and thus the subscription revenue generated from users—is driven by the different types of content offered by the service.³⁸ Further, a user’s willingness to pay for, demand for, and ultimately the profit-maximizing subscription service of the interactive music streaming service, all else being equal, increases with the number of different types of content offered by the service.³⁹ The subscription revenue from the interactive music streaming service must therefore be allocated across the different types of content offered by the service before the Section 115 royalty rates are applied to avoid double payment of royalties.⁴⁰

Copyright Owners’ rate proposal confirms that allocation makes economic sense. In Step 2, they define “Performance Royalty” as “the license fee payable for the right to perform

³⁵ COEX-7.30 at PAN_PRIII_Remand_00018885.

³⁶ COEX-7.52 at APL-PHONO4_00001542.

³⁷ COEX-2.26 at P4-SMP00000892; COEX-5.23 at P4-UMPG00002014; COEX-5.24 at P4-UMPG00001867.

³⁸ Leonard WDT ¶¶ 18, 27.

³⁹ *Id.* ¶¶ 40, 56, 71.

⁴⁰ *Id.* ¶¶ 56, 71.

publicly musical works *in Licensed Activity*” equal to “the amount *allocable to Licensed Activity uses* through the relevant Offering” if “the Service Provider is also engaging in the public performance of musical works that *does not constitute Licensed Activity*.”⁴¹ Of course, if allocation makes sense when deducting public performance royalties, it also makes sense for determining service revenues from covered activities.⁴² Proposing allocation for deductions but rejecting it for determining revenue is not based on any economic principle other than “more money.”

Subject to the rate structure adopted by the Judges, the Copyright Owners’ proposal may ultimately require Google to pay Section 115 royalties on “activities that are not specified by” Section 115 and do not constitute “Licensed Activity,” including activities for which Google already pays publishers and other licensors pursuant to voluntary agreements. This double payment makes no sense, results in a windfall, and contravenes Section 115, the existing regulations, and all of the relevant benchmarks.

IV. SUMMARY OF TESTIMONY

A. Fact Witness—Carletta Higginson, Director and Global Head of Music Publishing, YouTube

Google will present in its Rebuttal Case the testimony of Carletta Higginson, Director and Global Head of Music Publishing for the YouTube division of Google.

Ms. Higginson will testify about the inconsistencies between Copyright Owners’ rate proposal and the voluntary license agreements between music publishers as willing sellers and Google as a willing buyer. As Ms. Higginson will explain, the Copyright Owners’ proposed

⁴¹ COs’ Corrected WDS Proposed Rates & Terms, App’x B at B-5 (emphases added); see also Higginson WRT ¶¶ 31-34.

⁴² *Id.*

rates and terms are excessive and have never been agreed to in any direct deal between music publishers and Google. As she will further testify, they would also eliminate allocation of Service Provider Revenues, TCC, and subscribers, resulting in “double payment” to the Copyright Owners that would never be agreed to in the free market.

Ms. Higginson will testify that Copyright Owners’ proposal of a per-play prong is not something that Google has ever agreed to—over hundreds of agreements with U.S. music publishers—for YouTube Premium or YouTube Music; and moreover, that no music publisher has ever refused to enter into an agreement with Google for its refusal to agree to a per-play rate. As Ms. Higginson will explain, Google does not agree to per-play rates because increased consumption could result in costs exceeding revenues or representing too high a percentage of revenues. That, as Ms. Higginson will testify, is not a sustainable business model.

Ms. Higginson will address a number of the Copyright Owners’ other proposed revisions to the terms. In particular, Ms. Higginson will explain that the Copyright Owners’ proposed revisions to the following are unsupported and inconsistent with hundreds of voluntary license agreements between music publishers and Google: the definitions of “Licensed Activity,” “Performance Royalty,” “Play,” “Promotional Offering,” “Promotional Use,” “Relevant Page,” “Revenue,” “Stream,” “Subscriber,” and “TCC”; retaining certain recordkeeping obligations for promotional or free trial non-royalty bearing uses; adjusting the Subscriber rate and Play rate each year in accordance with the CPI; increasing the PSM from \$0.50 to \$1.50; retaining prescriptive accounting provisions and modifying reporting provisions; and deleting royalty floors for specific types of offerings.

Ms. Higginson will respond to claims about the role of the DMCA in negotiations. She will explain that Google could not build a music service based on the DMCA’s “safe harbor.” That would require YouTube to take down material whenever requested by the copyright owner pursuant to a valid takedown notice. But in order to build a viable music service, YouTube would need to offer broad and reliable music coverage. So rather than rely on material that could be subject to mandatory take-down procedures, Google sought comprehensive licenses instead.

Ms. Higginson will address the Copyright Owners’ speculation that Google underprices its subscription music services to attract customers to other Google products and thereby increase Google’s “complementary revenue streams.” Subscription prices for Google’s streaming products are consistent with comparable products offered by other streaming services. The notion that Google intentionally drives down the price of YouTube Music and YouTube Premium to drive growth of its other product lines—which reach orders of magnitude more people than Google’s music streaming services—is absurd.

Ms. Higginson will also address the Copyright Owners’ claim that publishers are disadvantaged by an information deficiency in their license negotiations with Google. Ms. Higginson will explain that as is typical in negotiations between sophisticated parties, both sides in these negotiations withhold sensitive and competitive information from one another.

**B. Expert Witness—Gregory K. Leonard, Ph.D.
Economist and Vice President, Charles River Associates**

Google will also present the testimony of its expert witness, Dr. Gregory K. Leonard. Dr. Leonard, an economist and Vice President at Charles River Associates, will offer rebuttal testimony that addresses Copyright Owners’ rate proposal and the deficiencies in the written

direct testimony of Copyright Owners' expert witnesses submitted in support of that proposal in view of the willing buyer/willing seller standard.

Dr. Leonard will testify that Google's rate proposal is supported by the most probative evidence in the record: Google's hundreds of direct license agreements with music publishers. Copyright Owners' proposed rates and terms, on the other hand, are directly contradicted by those benchmark agreements. In particular, Copyright Owners' proposed revisions to the definitions for "Offering" and "Service Provider Revenue" are inconsistent with the treatment of allocation in Google's publisher license agreements. And, none of Copyright Owners' expert, Dr. Eisenach's "benchmarks" refute this evidence of allocation. Likewise, Copyright Owners' proposal that the Section 115 royalty calculation include multiple prongs (percentage of revenue, TCC, per-subscriber, and per-play) is unsupported by marketplace evidence. Indeed, neither Copyright Owners nor their experts identify any currently effective license agreements for interactive music streaming services that contain such an array of prongs.

Dr. Leonard will also testify that willing buyers and willing sellers would not agree to Copyright Owners' proposed rates. The economic effects of the Copyright Owners' proposed rates are unreasonable. Copyright Owners' rates would, for example, increase all services' combined royalties as a percentage of revenue for their subscription, ad-supported, and total service offerings to [REDACTED], respectively.

As Dr. Leonard will explain, Dr. Eisenach's reliance on the Label Interactive Deals and blanket licenses for audio-visual streaming as "benchmarks" is misplaced because they are not comparable to the Section 115 license. With regard to the Label Interactive Deals, the 2.5:1 sound recording to musical works ratio that Dr. Eisenach uses from Dr. Gans' *Phonorecords III*

“Shapley-inspired” model—a key input in Dr. Eisenach’s benchmarking analysis—is unsupported. In addition, the Judges recognized that applying this ratio to existing sound recording royalty rates would be inappropriate because those rates are above the competitive level due to the labels’ complementary oligopoly power. As for the “blanket” licenses for AV streaming, the ■■■ sound recording to musical works ratio that Dr. Eisenach uses is similarly unsupported.

Dr. Leonard will also testify that the Copyright Owners’ experts, Drs. Eisenach and Watt’s claims that interactive music streaming drives other “complementary” revenue streams for the services are unsupported. He will also explain that these causal effects cannot be assumed, and if any causality were to exist between music streaming services and the services’ other revenue streams, it is more plausible they would tend to run in the opposite direction—that is, the existence of other offerings could have a positive causal effect on Google’s interactive music streaming service.

In addition, Dr. Leonard will explain that the Copyright Owners’ experts’ arguments about the supposed “information imbalance” or “asymmetric information” in licensing negotiations between Google and music publishers are unsupported and incorrect. Dr. Eisenach cites testimony that never stated any information asymmetry is “in favor of the platforms,” as Dr. Eisenach claims. And Drs. Watt and Spulber rely solely on speculation.

Dr. Leonard will also testify that Dr. Watt’s Shapley Value model is unreliable. As Dr. Leonard will explain, Dr. Watt continues to offer a highly abstract theoretical model with no empirical support for its validity as a description of the real-world industry or his decisions regarding key parameter values. That includes his incorrect assumption that the songwriter’s

contribution is equal to that of the artist and therefore that publishers (and songwriters) should get the same Shapley Values as labels (and artists); with this assumption necessarily overstating the Shapley Values, and thus Shapley revenue shares, for publishers.

V. SUMMARY OF DESIGNATED TESTIMONY

A. Testimony of Gregory K. Leonard in *Phonorecords III*

Dr. Leonard evaluated Google's rate proposal for the services covered under Section 385, Subparts B and C, in light of the existing rate structure and Google's and others' deals with music publishers. He testified that Google's existing agreements support the overall rate structure proposed by Google. Dr. Leonard also explained how the per-stream prong of Copyright Owners' proposal would be disruptive to consumers and streaming services, would result in decreased consumption of music, and would result in higher costs for services. He also addressed, among other things, Dr. Eisenach's failure to conduct an appropriate benchmark analysis.

B. Testimony of Zahavah Levine in *Phonorecords III*

Zahavah Levine was the Vice President of Partnerships for Google Play. Ms. Levine testified about the business of music streaming, Google's rate proposal, Google Play Music's services, and Google's licenses with publishers and record labels. She also explained why a per-play rate is inappropriate for a mechanical license and described past negotiations between Copyright Owners and digital music services for the rates paid to publishers.

C. Testimony of Waleed Diab in *Phonorecords III*

Waleed Diab is the Global Head of Recorded Music Business Development at Google. He manages Google's business relationships with record labels, including partnership efforts and licenses with both major and independent labels. As Mr. Diab testified, the Board's suggestion

that an increase in publishing rates was likely to result in a decrease in record label rates is belied by his experience. Following the Board’s initial determination, the core financial terms—including the headline royalty rate—of Google’s deals with record labels for its subscription music services did not change.

VI. CONCLUSION

In an evolving free market, especially for something as important as music, it is easy to get invested in the plight or success of individual participants (be they songwriters, publishers, services, or some other market participant). Like Copyright Owners, Google agrees the Board should avoid picking winners and losers. Thankfully, the task here is the far less Solomonic one of figuring out what willing buyers and sellers would agree to. Because Google has entered into hundreds of voluntary license agreements with music publishers, this task is a largely descriptive one and avoids the largely unanswerable normative questions.

Copyright Owners’ rate proposal is contradicted by the benchmark license agreements between Google and music publishers. Most critically, Copyright Owners’ proposed revisions to the definitions of “Offering” and “Service Provider Revenue” would eliminate allocation between Section 115 eligible and non-eligible content in mixed service offerings. But like many other aspects of Copyright Owners’ proposed rates and terms, this is entirely unsupported by market evidence. Copyright Owners’ rate proposal should be rejected.

Dated: April 22, 2022

/s/Victor Jih
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TAB B

PROPOSED RATES AND TERMS OF GOOGLE LLC
Updated April 22, 2022

Subpart A—Regulations of General Application

§385.1 General.

- (a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.
- (b) **Legal compliance.** Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.
- (c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.
- (d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part. The terms in this part shall be interpreted to prevent the double payment of royalties for Covered Activities.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Allocation means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Covered Activities and the denominator of which is the sum of

the number of Plays arising from Covered Activities and the number of Plays of Non-Eligible Works.

Annual Plans means a discounted plan where an End User subscriber pays a discounted price for a full year of access to a Subscription Offering.

Applicable Consideration means anything of value given for the identified rights to undertake a Covered Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Covered Activity but nevertheless provide consideration for the identified rights to undertake the Covered Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Covered Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Covered Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Bundle Percentage means [TBD based upon final, non-appealable determination in Phonorecords III].

Bundled Subscription Offering means a Subscription Offering providing Covered Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the Subscription Offering separate from the product(s) or service(s) with which it is made available (*e.g.*, a case in which an End User can buy a portable device and one-year access to a Subscription Offering for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Covered Activity means the activity of making a Digital Phonorecord Delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under 17 U.S.C. 115.

Demo Accounts means (1) accounts provided to business owners or operators for in-store demonstrations of an Offering to the public for private use and (2) Promoter Accounts.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for an amount of time not to exceed 31 days from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed 31 days), or in the case of a subscription plan, a period of time following the end of the applicable subscription.

End User means each unique person that (1) pays a subscription fee for an Offering during the relevant Accounting Period or (2) makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering beyond nominal amounts (e.g., \$1 per month per End User).

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior

to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes. Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

Net Subscription Revenues means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering (pro rated for a Bundled **Subscription Offering** by multiplying the dollar value of the Bundled Subscription Offering by the Bundle Percentage)), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions. Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also

excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

Non-Eligible Works means a sound recording, whether or not embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, and all audiovisual works that include musical works and all audiovisual works without any musical works, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

Offering means a Service Provider’s engagement in Covered Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fees payable for the right to perform publicly musical works in any Offering.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or local performance of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or local performance of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or local performance of an Eligible Limited Download that the Service Provider has determined was not initiated or requested by a human user.

Promoter Account means an account used by a person who works for or on behalf of an original equipment manufacturer, wireless carrier, third party with whom Licensee has entered into an agreement to provide a bundled offering of two or more products or services, one of which includes a Covered Activity, a sound recording or musical work copyright owner, or an influencer, to demonstrate, promote, influence or encourage the use of a Covered Activity.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;
- (2) The Promotional Offering is made available to an End User for free or for a nominal fee (e.g., \$1).

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

- (1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—
 - (i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or
 - (ii) In the case of physical phonorecords:
 - (A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or
 - (B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.*, an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the

reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue means, for each Offering, and for each Accounting Period, the sum of Net Advertising Revenues, if any, and Net Subscription Revenues, if any.

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted subscription to a Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle Subscription Offering.

Total Cost of Content or TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a copyrighted musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP.

United States means the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Winback Offer means a Subscription Offering made available for free or for a discount to an End User that had previously subscribed to a Subscription Offering for over six months and whose subscription has lapsed.

§385.3 [Reserved].

§385.4 [Reserved].

**Subpart B – Physical Phonorecord Deliveries,
Permanent Downloads, Ringtones, and Music Bundles.**

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

- (a) ***Physical phonorecord deliveries and Permanent Downloads.*** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) ***Ringtones.*** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.
- (c) ***Music Bundles.*** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

- (a) ***Applicable royalty.*** A Service Provider that engages in Covered Activity licensed under this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types

of services described in §385.22; provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part. A Service Provider that engages in Covered Activity licensed pursuant to license agreements entered into by the Service Provider and Copyright Owners shall not pay royalties under this subpart for Covered Activity that is subject to a voluntary license

- (b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider offers different Offerings, royalties must be calculated separately with respect to each Offering; provided that, Service Provider Revenue and TCC, as applicable, associated with such different Offerings shall be allocated between such different Offerings to prevent subjecting all or any portion of Service Provider Revenue and TCC, as applicable, to a royalty calculation more than once in an Accounting Period. If a Service Provider provides Plays of Covered Activity and Plays of Non-Eligible Works as part of a single Offering in an Accounting Period, such that some reproductions and distributions of musical works within such Offering are eligible for licensing pursuant to 17 U.S.C. 115 and some are not, then the royalty payments to be calculated pursuant to this paragraph (b) shall allocate Service Revenue and TCC, as applicable, between Covered Activity and activities that are not Covered Activity. Such calculation shall be determined for each Offering by multiplying the Service Provider Revenue and, for Subscription Offerings, TCC, in an Accounting Period by the Allocation; provided that, to the extent either Net Advertising Revenues or Net Subscription Revenues have previously been attributed solely to Covered Activities, no multiplication of Net Advertising Revenues or Net Subscription Revenues, as applicable, by the Allocation shall be performed.

(1) **Step 1: Calculate the All-In Royalty for the Offering.**

- (i) Subscription Offerings. For each Accounting Period, the all-in royalty for Subscription Offering in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue and (B) the applicable percent of TCC, as set forth in table below:

	2023 – 2027
Percent of Revenue	Final non-appealable rate established in Phonorecords III for 2022.
Percent of TCC	Final non-appealable rate established in Phonorecords III for 2022.

- (ii) Non-Subscription Offerings. For each Accounting Period, the all-in royalty for non-Subscription Offerings in this subpart (other than

Plays subject to subpart D of this part) shall be the applicable percent of Service Provider Revenue set forth in paragraph (b)(1)(i) of this section.

- (2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalties that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Covered Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also making public performances of musical works that are not Covered Activity. In the case in which the Service Provider is also making public performances of musical works that are not Covered Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Covered Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-Play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 of paragraph (b)(4) of this section.
- (3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Covered Activity for a particular Offering during the Accounting Period. This amount is the greater of:
 - (i) The result determined in step 2 in paragraph (b)(2) of this section; and
 - (ii) The royalty floor (if any) resulting from the calculations described in §385.22, multiplied by the Allocation.
- (4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Covered Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject

to subpart D of this part and Plays of Non-Eligible Works) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

The royalties payable under this paragraph (b)(4) for works still subject to copyright shall be paid to the Mechanical Licensing Collective; provided that, to the extent reproductions and distributions of musical works as part of a Covered Activity were made by a Service Provider pursuant to a voluntary license, royalty payments for such musical works shall be paid to the Copyright Owner that entered into a voluntary license with the Service Provider.

- (c) ***Overtime adjustment.*** For purposes of paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.
- (1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays
 - (2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays
 - (3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays
 - (4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays
 - (5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays
 - (6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.
- (d) ***Accounting.*** The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

§385.22 Royalty Floors for Specific Types of Offerings.

- (a) ***In general.*** The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Subscription Offerings.

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering—Streaming Only	15 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	30 cents per subscriber per month
Standalone Portable Subscription Offering	50 cents per subscriber per month
Bundled Subscription Offering	25 cents per month for each Active Subscriber during that month
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

- (b) ***Computation of royalty rates.*** For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Subscription Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product resulting from multiplying (1) the total number of subscriber-months for the Accounting Period by (2) the Allocation for the Subscription Offering by (3) the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

- (c) ***Adjustments to royalty floors.*** The following adjustments to royalty floors shall be made as applicable:

- (1) A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month.
- (2) A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.
- (3) An Annual Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Annual Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 12; provided that, the discount amount shall not exceed the value for 2 months of the undiscounted Subscription Offering purchased by the End User.
- (4) A Sixth-month Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Six-Month Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 6; provided that, the discount amount shall not exceed the value for 1 month of the undiscounted Subscription Offering purchased by the End User.
- (5) A Winback Offer subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Subscription Offering purchased by the End User and the denominator of which is the undiscounted price for the Subscription Offering purchased by the End User, subject to a maximum discount of 50% and a maximum duration of 6 months.
- (6) Where carrier-billing charges, carriage or in-app commission fees, or any other fees to platform, device or other distribution partners are paid in connection with transactions for a Subscription Offering and deducted from the relevant gross revenue calculation, the royalty floor for such End User shall be multiplied by a fraction, the numerator of which is the effective reduced price for the Subscription Offering and the denominator is the stated retail price for the Subscription Offering.

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

- (a) ***Promotional Offerings.*** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.
- (b) ***Free Trial Offerings.*** For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (c) ***Certain Purchased Content Locker Services.*** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (d) The royalty floor is zero for End User accounts used for Demo Accounts and for up to 15,000 Promoter Accounts.

TAB C

PROPOSED RATES AND TERMS OF GOOGLE LLC
Updated April 22, 2022¹

Subpart A—Regulations of General Application

§385.1 General.

- (a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.
- (b) **Legal compliance.** Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.
- (c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.
- (d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part. The terms in this part shall be interpreted to prevent the double payment of royalties for Covered Activities.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

¹ Redlined edits are to the Services' Joint Written Direct Remand Submission in re Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), Docket No. 16-CRB-003-PR (2018-2022) (Remand), Tab C (Apr. 5, 2021).

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Allocation means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Covered Activities and the denominator of which is the sum of the number of Plays arising from Covered Activities and the number of Plays of Non-Eligible Works.

Annual Plans means a discounted plan where an End User subscriber pays a discounted price for a full year of access to a Subscription Offering.

Applicable Consideration means anything of value given for the identified rights to undertake a Covered Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Covered Activity but nevertheless provide consideration for the identified rights to undertake the Covered Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Covered Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Covered Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Bundle Percentage means [TBD based upon final, non-appealable determination in Phonorecords III].

Bundled Subscription Offering means a Subscription Offering providing ~~Licensed~~Covered Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the ~~subscription service providing Licensed Activity~~Subscription Offering separate from the product(s) or service(s) with which it is made available (e.g., a case in which an End User can buy a portable device and one-year access to a ~~subscription service providing Licensed Activity~~Subscription Offering for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Covered Activity means the activity of making a Digital Phonorecord Delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under 17 U.S.C. 115.

Demo Accounts means (1) accounts provided to business owners or operators for in-store demonstrations of an Offering to the public for private use and (2) Promoter Accounts.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

~~(1) — An an amount of time not to exceed one-month31 days from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one-month31 days), or in the case of a subscription plan, a period of time following the end of the applicable subscription—no longer than a subscription renewal period or three months, whichever is shorter; or.~~

~~(2) — A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.~~

End User means each unique person that (1) Pays~~pays~~ a subscription fee for an Offering during the relevant Accounting Period or (2) Makes~~makes~~ at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when

~~(1) — Neither neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering; beyond nominal amounts (e.g., \$1 per month per End User).~~

~~(2) — The free usage does not exceed 30 consecutive days per subscriber per two-year period;~~

~~(3) — In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;~~

~~(4) — Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;~~

~~(5) — The Free Trial Offering is made available to the End User free of any charge; and~~

~~(6) — The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider.~~

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

~~**Licensed Activity**, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.~~

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User’s first request to use the sound recording via the Locker Service. The term Locker

Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes. Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

Net Subscription Revenues means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering (pro rated for a Bundled Subscription Offering by multiplying the dollar value of the Bundled Subscription Offering by the Bundle Percentage)), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions. Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also

excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

Non-Eligible Works means a sound recording, whether or not embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, and all audiovisual works that include musical works and all audiovisual works without any musical works, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

Offering means a Service Provider’s engagement in ~~Licensed~~Covered Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license ~~fee~~fees payable for the right to perform publicly musical works in any ~~of the forms covered by subparts C and D this part~~Offering.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or ~~play~~local performance of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or ~~play~~local performance of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or ~~play~~local performance of an Eligible Limited Download that the Service Provider has determined was not ~~been~~-initiated or requested by a human user. ~~If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.~~

Promoter Account means an account used by a person who works for or on behalf of an original equipment manufacturer, wireless carrier, third party with whom Licensee has entered into an agreement to provide a bundled offering of two or more products or services, one of which includes a Covered Activity, a sound recording or musical work copyright owner, or an influencer, to demonstrate, promote, influence or encourage the use of a Covered Activity.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

~~(2) — For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service~~

~~Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;~~

~~(3) — For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);~~

~~(4)(2)~~ The Promotional Offering is made available to an End User for free ~~of any charge; and/or for a nominal fee (e.g., \$1).~~

~~(5) — The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.~~

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the

same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue. ~~(1) Subject to paragraphs (2) through (5) of this definition~~ means, for each Offering, and ~~subject to GAAP, Service Provider Revenue shall mean:~~

~~(i) All revenue from End Users recognized by a Service Provider for~~ for each Accounting Period, the ~~provision of sum of Net Advertising Revenues, if any Offering;~~

~~(ii) All revenue recognized by a Service Provider by way of sponsorship, and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of any Offering, i.e., advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and~~

~~(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of~~

~~the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.~~

~~(2) — Service Provider Revenue shall:~~

~~(i) — Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider *in lieu* of its being recognized by the Service Provider; and~~

~~(ii) — Include the value of any barter or other nonmonetary consideration; and~~

~~(iii) — Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.~~

~~(3) — Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.~~

~~(4) — For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.~~

~~(5) — In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the revenue recognized from End Users for the bundle less the standalone published price for End Users for each of the other component(s) of the bundle; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or [Net Subscription Revenues](#), if more than one comparable exists, the average of standalone prices for comparables [any](#).~~

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

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- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted [subscription to a](#) Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a ~~bundle with one or more other products or services~~ [Bundle Subscription Offering](#).

Total Cost of Content or TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a [copyrighted](#) musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. ~~As used in this definition, "Applicable Consideration" means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.~~

~~§385.3 Late payments.~~

~~A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 17 U.S.C. 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.~~

~~§385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.~~

~~(a) — General. A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.~~

~~(b) — Retention of records. A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.~~

~~(e) — Availability of records. If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.~~

United States means the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Winback Offer means a Subscription Offering made available for free or for a discount to an End User that had previously subscribed to a Subscription Offering for over six months and whose subscription has lapsed.

§385.3 [Reserved].

§385.4 [Reserved].

Subpart B – Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles.

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

- (a) ***Physical phonorecord deliveries and Permanent Downloads.*** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) ***Ringtones.*** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.
- (c) ***Music Bundles.*** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings,

Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

- (a) **Applicable royalty.** ~~Licensees~~A Service Provider that ~~engage~~engages in ~~Licensed~~Covered Activity ~~covered by~~licensed under this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in ~~subsection (b) of this subpart, §385.22;~~ provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part. A Service Provider that engages in Covered Activity licensed pursuant to license agreements entered into by the Service Provider and Copyright Owners shall not pay royalties under this subpart for Covered Activity that is subject to a voluntary license
- (b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider ~~includes~~offers different Offerings, royalties must be calculated separately with respect to each Offering ~~taking into consideration; provided that,~~ Service Provider Revenue and ~~expenses~~TCC, as applicable, associated with ~~each Offering. For purposes of calculating rates pursuant to this section and all of its subparts, a Family Plan such~~ different Offerings shall be ~~treated as 1.5 subscribers per month, prorated~~allocated between such different Offerings to prevent subjecting all or any portion of Service Provider Revenue and TCC, as applicable, to a royalty calculation more than once in the case of an Accounting Period. If a Family Plan in effect for only Service Provider provides Plays of Covered Activity and Plays of Non-Eligible Works as part of a ~~calendar month and a Student Plan~~single Offering in an Accounting Period, such that some reproductions and distributions of musical works within such Offering are eligible for licensing pursuant to 17 U.S.C. 115 and some are not, then the royalty payments to be calculated pursuant to this paragraph (b) shall be ~~treated as 0.50 subscribers per month, prorated in the case of a Student Plan~~End User who subscribed ~~allocate~~ Service Revenue and TCC, as applicable, between Covered Activity and activities that are not Covered Activity. Such calculation shall be determined for ~~only part~~each Offering by multiplying the Service Provider Revenue and, for Subscription Offerings, TCC, in an Accounting Period by the Allocation; provided that, to the extent either Net Advertising Revenues or Net

Subscription Revenues have previously been attributed solely to Covered Activities, no multiplication of a calendar month Net Advertising Revenues or Net Subscription Revenues, as applicable, by the Allocation shall be performed.

(1) **Step 1: Calculate the All-In Royalty for the Offering.**

- (i) Subscription Offerings. For each Accounting Period, the all-in royalty for ~~all Offerings~~ Subscription Offering in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue ~~as set forth in in Column A of the table below~~ and (B) the applicable percent of TCC ~~or TCC amount,~~ as set forth in ~~Column B of the table below~~:

	<u>2023 – 2027</u>
<u>Percent of Revenue</u>	<u>Final non-appealable rate established in Phonorecords III for 2022.</u>
<u>Percent of TCC</u>	<u>Final non-appealable rate established in Phonorecords III for 2022.</u>

Offering	Column A % of Service Provider Revenue	Column B TCC % or TCC Amount
Standalone Non-Portable Subscription Offering—Streaming Only	10.5 %	The lesser of 22 % of TCC for the Accounting Period or 50 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	10.5 %	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month
Standalone Portable Subscription Offering	10.5 %	The lesser of 21 % of TCC for the Accounting Period or 80 cents per subscriber per month
Bundled Subscription Offering	10.5 %	21 % of TCC for the Accounting Period
Mixed Service Bundle	11.35%	21% of TCC for the Accounting Period
Limited Offering	10.5%	21% of TCC for the Accounting Period
Paid Locker Service	12%	20.65% of TCC for the Accounting Period
Purchased Content Locker Service	12%	22% of TCC for the Accounting Period

Offering	Column A % of Service Provider Revenue	Column B TCC % or TCC Amount
Free nonsubscription/ad-supported services free of any charge to the End User	40.5%	22% of TCC for the Accounting Period

(ii) Non-Subscription Offerings. For each Accounting Period, the all-in royalty for non-Subscription Offerings in this subpart (other than Plays subject to subpart D of this part) shall be the applicable percent of Service Provider Revenue set forth in paragraph (b)(1)(i) of this section.

- (2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance ~~Royalty~~Royalties that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute ~~Licensed~~Covered Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also ~~engaging in~~making public ~~performance~~performances of musical works that ~~does are~~ not ~~constitute Licensed~~Covered Activity. In the case in which the Service Provider is also ~~engaging in the~~making public ~~performance~~performances of musical works that ~~does are~~ not ~~constitute Licensed~~Covered Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to ~~Licensed~~Covered Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play~~Play~~ information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 of paragraph (b)(4) of this section.
- (3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its ~~Licensed~~Covered Activity for a particular Offering during the Accounting Period. This amount is the greater of:
- (i) The result determined in step 2 in paragraph (b)(2) of this section;
- and

(ii) The royalty floor (if any) ~~set forth~~ resulting from the calculations described in §385.22, multiplied by the Allocation.

(4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Covered Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (i.e., after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

The royalties payable under this paragraph (b)(4) for works still subject to copyright shall be paid to the Mechanical Licensing Collective; provided that, to the extent reproductions and distributions of musical works as part of a Covered Activity were made by a Service Provider pursuant to a voluntary license, royalty payments for such musical works shall be paid to the Copyright Owner that entered into a voluntary license with the Service Provider.

(c) **Overtime adjustment.** For purposes of paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

~~the~~ (d) Accounting. The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

§385.22 Royalty Floors for Specific Types of Offerings.

(a) In general. The following ~~table:~~royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Subscription Offerings.

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering—Streaming Only	15 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	30 cents per subscriber per month
Standalone Portable Subscription Offering	50 cents per subscriber per month
Bundled Subscription Offering	25 cents per month for each Active Subscriber during that month
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

(b) Computation of royalty ~~floors-~~rates. For purposes of ~~this~~ paragraph (b)(3),a) of this section, to determine the royalty floor, as applicable to any particular

Subscription Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering ~~where~~, subscriber-months shall be determined with respect to Active Subscribers. The product ~~of~~ resulting from multiplying (1) the total number of subscriber-months for the Accounting Period and by (2) the Allocation for the Subscription Offering by (3) the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(c) *Adjustments to royalty floors.* The following adjustments to royalty floors shall be made as applicable:

- (1) A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month.
- (2) A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.
- (3) An Annual Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Annual Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 12; provided that, the discount amount shall not exceed the value for 2 months of the undiscounted Subscription Offering purchased by the End User.
- (4) A Sixth-month Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Six-Month Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 6; provided that, the discount amount shall not exceed the value for 1 month of the undiscounted Subscription Offering purchased by the End User.
- (5) A Winback Offer subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Subscription Offering purchased by the End User and the denominator of which is the undiscounted price for the Subscription Offering purchased by the End User, subject to a maximum discount of 50% and a maximum duration of 6 months.
- (6) Where carrier-billing charges, carriage or in-app commission fees, or any other fees to platform, device or other distribution partners are paid in connection with transactions for a Subscription Offering and deducted from

the relevant gross revenue calculation, the royalty floor for such End User shall be multiplied by a fraction, the numerator of which is the effective reduced price for the Subscription Offering and the denominator is the stated retail price for the Subscription Offering.

- ~~(4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part) through the Offering during the Accounting Period. For purposes of determining the per work royalty allocation in all calculations under this step 4 only (i.e., after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.~~

~~Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.~~

- ~~(a) **Overtime adjustment.** For purposes of the calculations in step 4 in this paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows:~~

~~(1) 5:01 to 6:00 minutes Each Play = 1.2 Plays~~

~~(2) 6:01 to 7:00 minutes Each Play = 1.4 Plays~~

~~(3) 7:01 to 8:00 minutes Each Play = 1.6 Plays~~

~~(4) 8:01 to 9:00 minutes Each Play = 1.8 Plays~~

~~(5) 9:01 to 10:00 minutes Each Play = 2.0 Plays~~

~~(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.~~

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

- (a) **Promotional Offerings.** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.
- (b) **Free Trial Offerings.** For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (c) **Certain Purchased Content Locker Services.** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

~~(d) **Unauthorized use.** If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.~~

- (d) The royalty floor is zero for End User accounts used for Demo Accounts and for up to 15,000 Promoter Accounts.

TAB D

PROPOSED RATES AND TERMS OF GOOGLE LLC

Updated April 22, 2022¹

Subpart A—Regulations of General Application

§385.1 General.

- (a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.
- (b) **Legal compliance.** Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.
- (c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.
- (d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part. The terms in this part shall be interpreted to prevent the double payment of royalties for Covered Activities.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

¹ Redlined edits are to Google's proposed terms in its Written Direct Statement – Volume 1 in Dkt. No. 21-CRB-0001-PR (2023-2027) (Oct. 13, 2021).

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Allocation means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Covered Activities and the denominator of which is the sum of the number of Plays arising from Covered Activities and the number of Plays of Non-Eligible Works.

Annual Plans means a discounted plan where an End User subscriber pays a discounted price for a full year of access to a Subscription Offering.

Applicable Consideration means anything of value given for the identified rights to undertake a Covered Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Covered Activity but nevertheless provide consideration for the identified rights to undertake the Covered Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Covered Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Covered Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Bundle Percentage means [TBD based upon final, non-appealable determination in Phonorecords III].

Bundled Subscription Offering means a Subscription Offering providing Covered Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the Subscription Offering separate from the product(s) or service(s) with which it is made available (e.g., a case in which an End User can buy a portable device and one-year access to a Subscription Offering for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Covered Activity means the activity of making a Digital Phonorecord Delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under 17 U.S.C. 115.

Demo Accounts means (1) accounts provided to business owners or operators for in-store demonstrations of an Offering to the public for private use and (2) Promoter Accounts.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for an amount of time not to exceed 31 days from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed 31 days), or in the case of a subscription plan, a period of time following the end of the applicable subscription.

End User means each unique person that (1) pays a subscription fee for an Offering during the relevant Accounting Period or (2) makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering beyond nominal amounts (e.g., \$1 per month per End User).

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a

particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes, ~~and any carriage or in-app commission fees (if any)~~. Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

Net Subscription Revenues means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering

(including subscription fees from users of such Subscription Offering (pro rated for a Bundled **Subscription Offering** by multiplying the dollar value of the Bundled Subscription Offering by the Bundle Percentage)), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions. Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

Non-Eligible Works means a sound recording, whether or not embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, and all audiovisual works that include musical works and all audiovisual works without any musical works, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

Offering means a Service Provider’s engagement in Covered Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fees payable for the right to perform publicly musical works in any Offering.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or ~~play~~local performance of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or ~~play~~local performance of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or ~~play~~local performance of an Eligible Limited Download that the Service Provider has determined was not ~~been~~ initiated or requested by a human user. ~~If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.~~

Promoter Account means an account used by a person who works for or on behalf of an original equipment manufacturer, wireless carrier, third party with whom Licensee has entered into an agreement to provide a bundled offering of two or more products or services, one of which includes a Covered Activity, a sound recording or musical work copyright owner, or an influencer, to demonstrate, promote, influence or encourage the use of a Covered Activity.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;
- (2) The Promotional Offering is made available to an End User for free or for a nominal fee (e.g., \$1).

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

- (1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—
 - (i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or
 - (ii) In the case of physical phonorecords:
 - (A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or
 - (B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if

End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue means, for each Offering, and for each Accounting Period, the sum of Net Advertising Revenues, if any, and Net Subscription Revenues, if any.

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted subscription to a Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle Subscription Offering.

Total Cost of Content or TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a [copyrighted](#) musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP.

United States means the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Winback Offer means a Subscription Offering made available for free or for a discount to an End User that had previously subscribed to a Subscription Offering for over six months and whose subscription has lapsed.

§385.3 [Reserved].

§385.4 [Reserved].

Subpart B – Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles.

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

- (a) **Physical phonorecord deliveries and Permanent Downloads.** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) **Ringtones.** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.
- (c) **Music Bundles.** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and

nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

- (a) **Applicable royalty.** A Service Provider that engages in Covered Activity licensed under this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in §385.22; provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part. A Service Provider that engages in Covered Activity licensed pursuant to license agreements entered into by the Service Provider and Copyright Owners shall not pay royalties under this subpart for Covered Activity that is subject to a voluntary license
- (b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider offers different Offerings, royalties must be calculated separately with respect to each Offering; provided that, Service Provider Revenue and TCC, as applicable, associated with such different Offerings shall be allocated between such different Offerings to prevent subjecting all or any portion of Service Provider Revenue and TCC, as applicable, to a royalty calculation more than once in an Accounting Period. If a Service Provider provides Plays of Covered Activity and Plays of Non-Eligible Works as part of a single Offering in an Accounting Period, such that some reproductions and distributions of musical works within such Offering are eligible for licensing pursuant to 17 U.S.C. 115 and some are not, then the royalty payments to be calculated pursuant to this paragraph (b) shall allocate Service Revenue and TCC, as applicable, between Covered Activity and activities that are not Covered Activity. Such calculation shall be determined for each Offering by multiplying the Service Provider Revenue and, for Subscription Offerings, TCC, in an Accounting Period by the Allocation; provided that, to the extent either Net Advertising Revenues or Net Subscription Revenues have previously been attributed solely to Covered Activities, no multiplication of Net Advertising Revenues or Net Subscription Revenues, as applicable, by the Allocation shall be performed.
- (1) **Step 1: Calculate the All-In Royalty for the Offering.**
- (i) Subscription Offerings. For each Accounting Period, the all-in royalty for Subscription Offering in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue and (B) the applicable percent of TCC, as set forth in table below:

	2023 – 2027
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Percent of Revenue	Final non-appealable rate established in Phonorecords III for 2022, provided such rate is not a per-Play fee.
Percent of TCC	Final non-appealable rate established in Phonorecords III for 2022.

- (ii) Non-Subscription Offerings. For each Accounting Period, the all-in royalty for non-Subscription Offerings in this subpart (other than Plays subject to subpart D of this part) shall be the applicable percent of Service Provider Revenue set forth in paragraph (b)(1)(i) of this section.
- (2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalties that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Covered Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also making public performances of musical works that are not Covered Activity. In the case in which the Service Provider is also making public performances of musical works that are not Covered Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Covered Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-Play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 of paragraph (b)(4) of this section.
- (3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Covered Activity for a particular Offering during the Accounting Period. This amount is the greater of:
- (i) The result determined in step 2 in paragraph (b)(2) of this section; and
 - (ii) The royalty floor (if any) resulting from the calculations described in §385.22, multiplied by the Allocation.

- (4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Covered Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part and Plays of Non-Eligible Works) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

The royalties payable under this paragraph (b)(4) for works still subject to copyright shall be paid to the Mechanical Licensing Collective; provided that, to the extent reproductions and distributions of musical works as part of a Covered Activity were made by a Service Provider pursuant to a voluntary license, royalty payments for such musical works shall be paid to the Copyright Owner that entered into a voluntary license with the Service Provider.

- (c) **Overtime adjustment.** For purposes of paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

- (1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays
- (2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays
- (3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays
- (4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays
- (5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays

- (6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.
- (d) **Accounting.** The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

§385.22 Royalty Floors for Specific Types of Offerings.

- (a) **In general.** The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Subscription Offerings.

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering—Streaming Only	15 cents per subscriber per month
Standalone Non-Portable Subscription Offering—Mixed	30 cents per subscriber per month
Standalone Portable Subscription Offering	50 cents per subscriber per month
Bundled Subscription Offering	25 cents per month for each Active Subscriber during that month
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

- (b) **Computation of royalty rates.** For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Subscription Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled

Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product resulting from multiplying (1) the total number of subscriber-months for the Accounting Period by (2) the Allocation for the Subscription Offering by (3) the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(c) ***Adjustments to royalty floors.*** The following adjustments to royalty floors shall be made as applicable:

- (1) A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month.
- (2) A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.
- (3) An Annual Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Annual Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 12; provided that, the discount amount shall not exceed the value for 2 months of the undiscounted Subscription Offering purchased by the End User.
- (4) A Sixth-month Plan subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Six-Month Plan purchased by the End User and the denominator is the undiscounted price for the Subscription Offering purchased by the End User multiplied by 6; provided that, the discount amount shall not exceed the value for 1 month of the undiscounted Subscription Offering purchased by the End User.
- (5) A Winback Offer subscriber shall be multiplied by a fraction, the numerator of which is the discounted price for the Subscription Offering purchased by the End User and the denominator of which is the undiscounted price for the Subscription Offering purchased by the End User, subject to a maximum discount of 50% and a maximum duration of 6 months.
- (6) Where carrier-billing charges, carriage or in-app commission fees, or any other fees to platform, device or other distribution partners are paid in connection with transactions for a Subscription Offering and deducted from the relevant gross revenue calculation, the royalty floor for such End User shall be multiplied by a fraction, the numerator of which is the effective reduced price for the Subscription Offering and the denominator is the stated retail price for the Subscription Offering.

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

- (a) ***Promotional Offerings.*** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.
- (b) ***Free Trial Offerings.*** For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (c) ***Certain Purchased Content Locker Services.*** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.
- (d) The royalty floor is zero for End User accounts used for Demo Accounts and for up to 15,000 Promoter Accounts.

TAB E

INDEX OF WITNESS TESTIMONY

<u>Witness</u>	<u>Title</u>
Carletta Higginson	Director and Global Head of Music Publishing of YouTube Division
Gregory K. Leonard	Vice President of Charles River Associates (CRA)

TAB F

INDEX OF EXHIBITS

<u>Ex. No.</u>	<u>Restricted</u>	<u>Sponsored By</u>	<u>Description</u>	<u>Bates Nos.</u>
Google Reb. Ex. 01	Yes	Carletta Higginson	Calculation of Impact of Copyright Owners' Phono IV Rate Proposal	GOOG-PHONOIV-00005664-677
Google Reb. Ex. 02	Yes	Gregory K. Leonard	Sound Recording Audiovisual Content License between [REDACTED] [REDACTED] [REDACTED]	GOOG-PHONOIV-00003817-931
Google Reb. Ex. 03	Yes	Gregory K. Leonard	Data Regarding [REDACTED] [REDACTED]	GOOG-PHONOIV-00005401
Google Reb. Ex. 04	Yes	Gregory K. Leonard	Document Provided by BMG	P4-BMG00446383
Google Reb. Ex. 05	Yes	Gregory K. Leonard	Document Provided by Kobalt	P4-KOBALT00000933
Google Reb. Ex. 06	Yes	Gregory K. Leonard	Document Provided By Kobalt	P4-KOBALT00000934
Google Reb. Ex. 07	Yes	Gregory K. Leonard	Document Provided by SMP	P4-SMP00000909
Google Reb. Ex. 08	Yes	Gregory K. Leonard	Document Provided by SMP	P4-SMP00002923
Google Reb. Ex. 09	Yes	Gregory K. Leonard	Document Provided by UMPG	P4-UMPG00004171
Google Reb. Ex. 10	Yes	Gregory K. Leonard	Document Provided by Warner Chappell	P4-WARNER_CHAPPELL00000590
Google Reb. Ex. 11	Yes	Gregory K. Leonard	Document Provided by UMPG	P4-UMPG00004582
Google Reb. Ex. 12	Yes	Gregory K. Leonard	Document Provided by Warner Chappell	P4-WARNER_CHAPPELL00001525

TAB G

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**DECLARATION AND CERTIFICATION OF VICTOR H. JIH
ON BEHALF OF GOOGLE LLC**

1. I am counsel for Google LLC (“Google”) in the above-captioned case. I submit this declaration pursuant to the terms of the Amended Protective Order issued November 4, 2021. I am authorized by Google to submit this Declaration.

2. I have reviewed Google’s Written Rebuttal Statement, witness statements, and exhibits (collectively, “Written Rebuttal Statement”). I have also reviewed the definitions and terms provided in the Amended Protective Order. After consultation with my client, I have determined that to the best of my knowledge, information, and belief, that portions of Google’s Written Rebuttal Statement contain information that is “Restricted” material as defined by the Amended Protective Order.

3. Such Protected Material includes, but is not limited to, testimony and exhibits involving contracts, contractual terms, negotiations, contract strategies, financial data, and internal business information, all of which are proprietary, not available to the public, and commercially sensitive. Certain additional material has also been marked as “Restricted” where the material was so designated by other participants in this proceeding. This is information that Google is required to keep confidential under the Amended Protective Order and does keep confidential.

*Google Written Rebuttal Statement
Dkt. No. 21-CRB-0001-PR (2023-2027)*

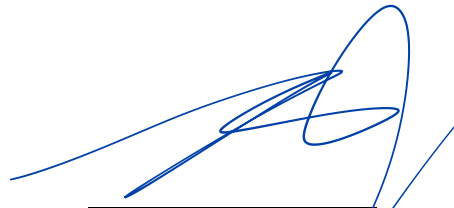
4. If this confidential information were to become public, it would place Google at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of Google, and jeopardize its business interests. Information related to confidential contracts or relationships with third-party content providers could be used by Google's competitors, or by other content providers, to formulate rival bids, bid up Google payments, or otherwise unfairly jeopardize Google's commercial and competitive interests.

5. The written rebuttal testimony of Carletta Higginson, Director and Global Head of Music Publishing of YouTube Division, contains material, non-public information concerning, among other things, Google's business of music streaming, Google's rate proposal, Google's music-related services, and Google's licenses with publishers. None of this information is publicly known or available. Disclosure of the financial details of these contractual arrangements and non-public financial data would, for reasons discussed in paragraphs 3 and 4 above, among others, competitively disadvantage Google.

6. The written rebuttal testimony of Dr. Gregory K. Leonard contains material, non-public information concerning, among other things, the particular rates agreed to by specific Google direct licensors, and license agreements and material non-public financial data concerning payments to publishers and record labels, revenue, and similar information for other services that has been designated as "Restricted." None of this information is publicly known or available. Disclosure of this information would, for reasons discussed in paragraphs 3 and 4 above, among others, competitively disadvantage Google.

7. Google has also submitted designated testimony from Docket. No. 16-CRB-0003-PR (2018-2022) ("*Phono III*") from Waleed Diab, Zahavah Levine, and Dr. Gregory K. Leonard. Google seeks restricted status solely for the portions of that testimony that were previously granted restricted status in the prior proceedings.

I declare under the penalty of perjury that, to the best of my knowledge, information, and belief, the foregoing is true and correct, and that I executed this Declaration on April 22, 2022 in Los Angeles, CA.



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vjih@wsgr.com

Counsel for Google LLC

Proof of Delivery

I hereby certify that on Tuesday, April 26, 2022, I provided a true and correct copy of the Written Rebuttal Statement of Google LLC – Volume 1 of 4 to the following:

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at

senglund@jenner.com

Signed: /s/ Victor Jih